

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE: BATTALION CHIEFS OF THE :
CITY OF WILMINGTON : Representation Petition
FIRE DEPARTMENT : No. 95-06-142
[Internal Affairs Officer]

The Wilmington Fire Department Firefighters Association, IAFF, ("WFFA") is an employee organization within the meaning of Section 1602(f) of the Police Officers' and Firefighters' Employment Relations Act, 19 DeL.C. Chapter 16 ("Act").

The City of Wilmington ("City") is a public employer within the meaning of Section 1602(l), of the Act.

On June 19, 1995, a representation petition was filed with the Public Employment Relations Board ("PERB" or "Board") seeking to modify the existing bargaining unit of Fire Department personnel represented by the WFFA to include the classification of Battalion Chief. The petition was supported by a sufficient showing of interest as required by Section 1610(a), of the Act. The City opposed the petition for the reason that the Battalion Chiefs are inappropriate for inclusion in the same bargaining unit with subordinate personnel.

A hearing was held on August 15, 1995, to determine whether or not the classification of Battalion Chief was appropriate for inclusion in the existing bargaining unit. In a decision issued on November 22, 1995, the hearing officer determined the classification of Battalion Chief to be appropriate for inclusion in the WFFA bargaining unit. A representation election was

scheduled for December 28, 1995, for the purpose of determining by a majority vote of the Battalion Chiefs whether or not they desired to become part of the bargaining unit represented by the WFFA.

On December 4, 1995, the City requested that the decision of the hearing officer be held in abeyance pending a determination of whether the position of Internal Affairs Officer should be excluded from the bargaining unit.¹ By letter dated December 6, 1995, the Executive Director of the PERB directed that the election be held as scheduled with the understanding that the status of the Internal Affairs Officer would be resolved after the election, if necessary, and the parties were afforded the opportunity to submit written argument in support of their respective positions.²

Following the election, in which the Battalion Chiefs voted unanimously to join the existing bargaining unit, the parties were provided the opportunity to submit written argument. The City's initial submission dated February 16, 1996, not only addressed the status of the Internal Affairs Officer but also requested to divide the bargaining unit into two (2) separate units, one comprised of firefighters, Lieutenants and Captains and the other

¹The classification of Battalion Chief-Support Services, is responsible for the internal affairs functions. Overall, the Battalion Chief-Support Services is responsible for "the management of the administrative functions of the fire department which includes the Data and the Statistics Unit, payroll, recruitment and hiring, budget and purchasing, and the Internal Affairs' Unit." (Wilmington Fire Department Rules and Regulations, Personnel Procedures, Battalion Chief-Support Services, para. 2) For the purpose of this decision, the terms "Internal Affairs Officer" and "Battalion Chief-Support Services" are used interchangeably.

²The Battalion Chief-Support Services was permitted to participate in the election by voting a challenged ballot. Because the unchallenged ballots unanimously favored joining the WFFA bargaining unit, it was not necessary to consider the challenged ballot of the Battalion Chief-Support Services.

unit comprised of the Battalion Chiefs. The responsive submission from the WFFA was received on February 28, 1995.

ISSUE

1. Is the classification of Battalion Chief appropriate for inclusion in the existing bargaining unit represented by the IAFF?

2. Is the position of Internal Affairs Officer inappropriate, within the meaning of Section 1610(d), of the Act, for inclusion in the bargaining unit represented by the WFFA because of the responsibility for:

- (a) administering the drug and alcohol testing policy and access to the test results and/or;
- (b) participating in the administration of the disciplinary process?

POSITIONS OF THE PARTIES

Issue No. 1: City: The City objects to the inclusion of the Battalion Chiefs in the existing unit for the reason that the decision of November 22, 1995, did not properly consider the effect of overfragmentation of bargaining units on the efficient administration of government, as required by the Act. For this reason, the City requests that the PERB now consider the City's argument and divide the existing unit into the two (2) separate units of Battalion Chiefs and firefighters, Lieutenants and Captains.

WFFA: The WFFA maintains that in the absence of a timely appeal by the City pursuant to PERB Rule 7.4, the decision of November 22, 1995, is final and binding as to the appropriateness of the Battalion Chief classification(s) for inclusion in the existing bargaining unit and not subject to further review in this proceeding.

Issue No. 2: City: The City maintains that the inclusion of the position of Internal Affairs Officer in the bargaining unit is inappropriate because the responsibilities of the position include: (1) serving as the prosecuting officer in all trial and appeal boards reviewing charges against firefighters and other officers; and (2) administering the drug and alcohol policy resulting in access to what it terms "highly sensitive and personal information" about each member of the Fire Department, including the Chief, in the form of test results.

WFFA: The WFFA argues that the decision of November 22, 1995, also resolved the status of the Internal Affairs Officer insofar as its appropriateness for inclusion in the existing bargaining unit.

Alternatively, the WFFA further argues that, unlike 19 Del.C. Chapter 13, the Public Employment Relations Act, there is no "confidential" exclusion under 19 Del.C. Chapter 16, the Police Officers' and Firefighters' Employment Relations Act. Furthermore, since the responsibilities of the Internal Affairs Officer do not involve or impact upon the collective bargaining process it cannot be excluded on the basis that it is a confidential position even if such an exception were considered appropriate.

The WFFA contends that the involvement of the Internal Affairs Officer involving the administration of discipline is essentially ministerial. It maintains that mere knowledge of or access to the test results does not constitute a conflict of interest or an otherwise valid reason for excluding the position from the bargaining unit.

OPINION

Issue No. 1: A Notice of Public Hearing concerning the representation hearing held on August 15, 1995, was posted on July 13, 1995, pursuant to 19 Del.C., Freedom of Information Act, Section 10004(e)(1). The Notice provides, in relevant part:

The primary purpose of this hearing will be to receive evidence concerning whether the Battalion Chiefs are appropriate for inclusion within the bargaining unit currently represented by the Wilmington Firefighters Association, Local 1590, IAFF.

During the hearing, the parties were afforded ample opportunity to present testimony and documentary evidence concerning the issue of whether or not the Battalion Chiefs are appropriate for inclusion in the existing unit. Written arguments were filed following the hearing. At the time the decision was issued the parties were advised, in writing, of their right of appeal pursuant to Section 7.4, of the Board's Rules and Regulations. No appeal was taken by the City from the determination that the classification of Battalion Chief is appropriate for inclusion in the existing unit.

In the absence of a valid appeal, the appropriateness of the Battalion Chief classification to be a part of the existing bargaining unit has been finally resolved and is not subject to review or reconsideration, except as provided for in Rule 3.4(8) of the Board's rules and regulations.

Issue No. 2: Unlike 19 Del.C. Ch. 13, The Public Employment Relations Act, Section 1302(e) and 14 Del.C. Ch. 40, The Public School Employment Relations Act, Section 4002(f), the statute governing this dispute does not exclude confidential employees from coverage under the Act. The absence of a

"confidential" exclusion, however, is inconsequential since the City does not raise a question of eligibility based upon confidential status. Essentially, the City argues that access of the Internal Affairs Officer to the alcohol and drug testing results and his or her prosecutorial role in the disciplinary process renders the position inappropriate for inclusion in the WFFA bargaining unit.

A primary consideration in the November 22, 1995, decision involved the relative duties, skills and working conditions of the classification of Battalion Chief with the other classifications in the bargaining unit. At no time prior to or during the hearing or in the post-hearing briefs, was the classification of Battalion Chief-Support Services distinguished from other Battalion Chiefs or relied upon as a basis for excluding the former from the existing bargaining unit. Throughout the processing of this matter reference has always been to the Internal Affairs Officer rather than to a Battalion Chief whose responsibilities include internal affairs.

For this reason, the position of WFFA that the issue of the appropriateness of the Internal Affairs Officer was resolved by the determination as to the appropriateness of the Battalion Chiefs is not without merit. However, the parties were advised by the Executive Director in writing prior to the election that pursuant to the City's request the issue of the Internal Affairs Officer would be resolved after the election if the result so required. No objection was raised by the WFFA. For this reason, the Association's position concerning the finality of the decision of November 22, 1995, as it impacts upon the position of Internal Affairs Officer, is rejected.

The City's reliance upon the drug and alcohol testing policy is misplaced. The policy was negotiated by the parties and is set forth in Article

27, of the collective bargaining agreement. The policy authorizes three (3) types of testing: (1) routine annual testing; (2) random testing; and (3) reasonable suspicion testing. Annual testing is scheduled as a part of the annual physical examination. The selection of personnel for random testing is controlled by the Personnel Department. Reasonable suspicion testing results from specific observable behavior for which all firefighters, regardless of rank, are encouraged to be alert. Article 27.8. The selection of employees to be tested is, therefore, not within the control of the Internal Affairs Officer.

Similarly, discipline resulting from a violation of the Policy is contractual and is to be assessed according to the procedures set forth in the collective bargaining agreement. Article 27.11.

Although the confidentiality of the test results is a valid concern, the Internal Affairs Officer is not the only person permitted access to the results. Article 27.3(c) provides that test results ". . . will be shared only with those few individuals having authorization from the Fire Chief." It is unreasonable to conclude that, except for instances involving the Chief and the Deputy Chiefs, positive test results would not be shared with one (1) or more officers within the direct chain of command of the individual involved. Since all of the officers of the Fire Department below the rank of Deputy Chief are included within the bargaining unit, access to the test results is not a valid reason for excluding the Battalion Chief-Support Services.

If the confidentiality of test results is breached, the Internal Affairs Officer is subject to appropriate corrective action the same as any other officer who divulges sensitive and/or personal information to which he or she is privy on a confidential basis. Article 27.3(c).

As set forth in the Personnel Procedures section of the Department's Rules and Regulations, participation by the Battalion Chief-Support Services in the disciplinary process, includes:

- (1) . . . investigate all official complaints lodged against the Fire Department or any member and take the necessary action. (para. 10)
- (2) . . . investigate alleged violations of the Rules and Regulations, Orders and policies for which charges have been filed against any fire department member. (para. 11)
- (3) be the prosecuting officer for an official Trial Board and maintain an accurate and up-to-date record of all validated charges filed against each member. (para. 12)

As specific examples of the involvement of the Internal Affairs Officer in the disciplinary process, the City cites the following Departmental Rules:

1. Provide an accused member with a written charge statement, and receive a member's written answer, thereto in a sealed, confidential envelope (Rules 4:08 and 9:05);
2. Receive the decision of a member under charge as to attorney representation (Rule 4:14);
3. Validate or dismiss a charge against an accused member holding the rank of Captain or below (Rule 6:05);
4. Establish an official trial board hearing (Rule 9:01);
5. Keep files and/or records of all official trial hearings (Rule 9:07);
6. Prosecute or appoint a prosecuting officer for all official trial board hearings (Rule 9:07);
7. Decide if prosecutorial appeal from an official trial board decision is appropriate (Rule 10:04);
8. Receive the decision of a guilty member as to an appeal (Rule 10:08); and
9. Prosecute all official appeal panel hearings (Rule 10:07).

Other than validating charges and prosecuting charges before trial boards, which require individual consideration, the involvement by the Battalion Chief-Support Services in the disciplinary process are merely administrative in nature.

Section 7:01 of the Rules and Regulations authorizes a Superior Officer to offer Summary Punishment not to exceed the degree of punishment set forth in Appendix A of the Rules. A member of the Fire Department who accepts an offer of summary punishment is deemed to have: (1) admitted his or her guilt; (2) waived his or her right to a formal hearing; and (3) accepted the penalty. (Rule 7:02)

Summary discipline may only be offered after the charge has been validated. The term "validated charge" refers to a charge which has been reviewed and found to have been preferred correctly and supported by substance and/or competent evidence. (Rule 6:04)

For charges involving a penalty of less than discharge and where summary punishment is offered, the Chief of Fire or his representative, the Division Commander or his representative or the on-duty Battalion Chief may validate the charge(s), depending upon the assignment of the employee against whom the charge is brought. An offer of summary discipline is subject to review and approval. (Rule 6:05)

In cases where summary discipline is not offered or not approved and the rank of the employee charged is Captain or below, it is the responsibility of the Internal Affairs Officer to validate the charge(s). (Rule 6:05)

The record clearly establishes that the responsibility of the Battalion Chief-Support Services to validate charges against members of the Fire

Department is not unlike that of other officers, most of whom who are members of the bargaining unit.

The Battalion Chief responsible for Internal Affairs is also responsible for prosecuting charges before a trial or appeal board or for appointing the individual to serve as the prosecutor. The composition of trial boards was addressed in the decision of November 22, 1995, in which the hearing officer concluded:

Under full disciplinary procedures, officers of the Fire Department are selected to serve on a three (3) member Trial Board. Although the stated preference of the current administration is to appoint a Battalion Chief to head any given Trial Board, it is not mandated by the Department's Rules and Regulations. The other two (2) members of the panel are Lieutenants and/or Captains. Testimony established that Lieutenants and Captains have served as Trial Board Presidents in the past.

The three (3) member trial board has authority to act "in the capacity of judge and jury" (Rule 9:13). If the Trial Board finds the charged employee guilty of the charge it shall set the appropriate penalty (Rule 9:28).

Considering the role and decision-making authority of a trial board, participation by the Internal Affairs Officer as prosecutor warrants no greater weight in assessing suitability for inclusion in the existing bargaining unit than does the participation by Battalion Chiefs, Captains and/or Lieutenants who comprise the trial boards and are all included in the bargaining unit.

The PERB has authority under the Act only to exclude persons from a bargaining unit for reason that they are inappropriate based upon the considerations set forth in Section 1610(d), of the Act. In the City of Wilmington there is a single bargaining unit of employees of the Fire

Department. To exclude one (1) position from the existing unit would effectively deny the incumbent access to the rights and privileges guaranteed by the Act. Except for the most compelling reason(s), eligible employees should not be denied access to the rights and protections to which they are otherwise entitled.

DECISION

Issue No. 1: In the absence of a timely appeal pursuant to Rule 7.4, the decision of November 22, 1995, resolved the issue of the appropriateness of the Battalion Chief classification for inclusion in the current bargaining unit represented by the WFFA.

Issue No. 2: For the reasons discussed, the position of Internal Affairs Officer is not inappropriate, within the meaning of Section 1610(d), of the Act, for inclusion in the current bargaining unit represented by the WFFA because of his or her responsibility for the administration of the Department's drug and alcohol testing policy and access to the test results and/or participation in the disciplinary process.

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
Del. Public Employment Relations Bd.

DATED: April 2, 1996